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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 15

STATE OF MISSOURI, AT THE RELATION OF SOUTHERN RAILWAY COMPANY,

Petitioner,

vs.

ALDO C. MAYFIELD, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI, AND HIS SUCCESSORS, AS PRESIDING JUDGE OF SAID COURT,

Respondent.

No. 16

TATE OF MISSOURI, EX REL. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

AVID J. MURPHY, JUDGE OF THE CIRCUIT COURT OF THE CITY OF ST. LOUIS, MISSOURI, AND HIS SUCCESSORS, AS PRESIDING JUDGE OF SAID COURT,

Respondent.

REPLY BRIEF.

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The decision of the Supreme Court of Missouri rests solely and squarely on a federal ground. The Missouri Court pointedly and specifically declined to rest its decision on Missouri law. The only question presented to this Court for decision is whether there is any provision of the Constitution or the statutes of the United States which takes from a state court its right to decline to exercise its jurisdiction of a F. E. L. A. case and to dismiss the case on the ground of inappropriate forum within the doctrine of *forum non conveniens* 2

The Congress of the United States in the enactment of the Federal Employers' Liability Act did not legislate with respect to venue or procedure of state courts, It dealt only with venue and procedure of federal courts. Section 6 of the Act denotes nothing one way or the other respecting *forum non conveniens*..... 6

The Missouri Supreme Court erred in its interpretation of the opinions of this Court in the *Kepner* and *Miles* cases. The forum in which the subject case of those decisions respectively was pending was not called upon to determine whether the exercise of its jurisdiction should be withheld because of matters of convenience to the parties or to other litigants or to the Court, and the doctrine of *forum non conveniens* was not involved in either of the cases 9

Section 6 of the Federal Employers' Liability Act, if it meant what the Missouri Supreme Court says it means, would invade the fundamental right of states to regulate and control the venue and procedure of their courts. There is nothing in the Constitution of the United States which even suggests that Congress has authority to legislate with respect to state courts 12

Since Congress, by enactment of Section 1404(a) of the Judicial Code, declared a general federal public policy favoring the application of *forum non con-*

veniens to all civil actions in federal courts, no possible inference can now be drawn from the language of F. E. L. A. which would forbid the application of that doctrine by state courts to actions under that Act. It is inconceivable that Congress intended at the same time to authorize all federal district courts to apply the doctrine in F. E. L. A. cases by removing the "judicial gloss" of the *Kepner* case by the enactment of Section 1404 (a) of the Judicial Code, and yet intended to continue by its silence a federal prohibition deriving from the "judicial gloss" of the *Miles* case which contains the general expressions on which the Missouri Supreme Court rests its decision 13

The application of the doctrine of *forum non conveniens* in F. E. L. A. cases does not violate the privileges and immunities of Article IV, Section 2, of the Constitution of the United States. Every court, federal and state, which has recognized and applied the doctrine in refusing to retain for trial and decision a case of which it has jurisdiction but which it determined the orderly administration of justice required to be tried in a more appropriate forum, has in effect held that this clause did not prohibit the application of the doctrine. Otherwise the doctrine could never be applied, whatever the circumstances 15

The decision of the Missouri Supreme Court on the questions presented by this record is directly in conflict with the decision of this Court in *Douglas* v. *N. Y., N. H. & H. R. Co.*, 279 U. S. 377, and the decisions of the Supreme Courts of New York, Illinois, Ohio, Utah, and other states 18

A plaintiff having a legitimate right to maintain his case in a state court selected by him can and will be protected in that right without denying to the selected forum the right to refuse to retain for trial a case which it is clear was procured and transported from a distant state for illegitimate purposes. The doctrine of *forum non conveniens* is a wholesome doctrine and its proper application does not conflict with any legitimate right or privilege of a plaintiff 22

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Respondent.

REPLY BRIEF.

I.-III.

The Decision of the Supreme Court of Missouri Rests Solely and Squarely on a Federal Ground. The Missouri Court Pointedly and Specifically Declined to Rest Its Decision on Missouri Law.

There was presented to the Supreme Court of Missouri by the petitions for writ of mandamus the question whether the Circuit Court of the City of St. Louis had jurisdiction to entertain motions to dismiss the subject cases on the ground of inappropriate forum within the doctrine of *forum non conveniens*. (Tr. 1-35, 36-64, 68.) The Circuit Court, relying upon *Bright* v. *Wheelock*, 323 Mo. 840, 20 S. W. 2d 684, had ruled it did not have jurisdiction to entertain the motions and had suggested a mandamus proceeding to clarify the Missouri law on the subject. (Tr. 28-30.) The suggestions in support of the petitions for the writ analyzed the Missouri decisions with a view to demonstrating that there was no decision of the Missouri Supreme Court which denied to the Circuit Court the right to decline its jurisdiction under the principles of *forum non conveniens*. (Tr. 7-18, 41-49.) The briefs of the parties in the Supreme Court of Missouri are not in the record, but it may be assumed that the brief of petitioners in the consolidated case amplified their suggestions in support of their petitions, and that the brief of respondents was substantially the same as the brief of respondents filed in this Court. While the Supreme Court of Missouri was asked by the parties to settle the law of Missouri on the subject, it pointedly and specifically declined, saying (Tr. 75):

> "Respondents also contend that under our Constitution and statutes the doctrine of *forum non conveniens* cannot be recognized in Missouri. Since we have already ruled the trial court had no discretion in Fed-

eral Employers' Liability cases, it is not necessary to discuss the Missouri law upon that subject."

We think this language of the Missouri Supreme Court shows that respondents in that Court placed special emphasis upon the proposition that Section 6 of F. E. L. A., as construed by this Court, denied to the Missouri courts the authority to apply the doctrine of *forum non conveniens* in dismissing a F. E. L. A. case, and that their contention that the doctrine of *forum non conveniens* is not recognized in Missouri was a secondary defense to the petitions. If the law of Missouri were as well settled against the contentions of petitioners as respondents now want this Court to believe, it would appear that the Missouri Supreme Court would have refused to entertain the petitions and to issue its alternative writs of mandamus, and if it had taken this step it would have entered a judgment quashing its alternative writs with a memorandum opinion citing its earlier decisions and would not have struggled through a long opinion trying to demonstrate that Section 2, Article IV, of the Constitution of the United States and Section 6 of Federal Employers' Liability Act, as construed by this Court in the *Kepner* and *Miles* cases, barred the Missouri courts from entertaining a motion to dismiss on the ground of inappropriate forum within the doctrine of *forum non conveniens.*

Since the Missouri Supreme Court did not rest its decision on Missouri law, but rested it solely and squarely on federal grounds, we do not consider it appropriate to discuss the law of Missouri. This Court will not determine the law of Missouri but will send the case back to the Missouri courts to determine that law, after it has ruled, if it so rules, that there is no provision of the Federal Constitution or statutes denying to a state court the authority to determine on the merits a motion invoking the doctrine of *forum non conveniens* in F. E. L. A. cases.

However, lest by our silence we might appear to agree with respondents' interpretation of the Missouri decisions, we point out that all of respondents' argument rests on general expressions lifted out of their context. *State, etc.* v. *Grimm,* 239 Mo. 135, 143 S. W. 483, involved an original proceeding in the Supreme Court seeking to prohibit the Circuit Court from further proceeding with the trial on the grounds, (a) that service of process on the defendant was insufficient, and (b) that the courts of Missouri had no jurisdiction of a foreign insurance company in causes of action arising out of business done in other states with citizens of those states. In *Gold Issue M. & M. Co.* v. *Pennsylvania Fire Ins. Co.,* 267 Mo. 524, 184 S. W. 999, the questions were whether the Missouri Court had jurisdiction of the defendant and of the subject matter. In *British-American P. C. Co.* v. *Citizens Gas Co.,* 255 Mo. 1, 164 S. W. 468, the question was as to the right of plaintiff to file his suit in a Missouri court. In *Burg,* v. *Knox* (Mo. 1933), 67 S. W. 2d 96, the question was whether the right of action was barred in Missouri because it was based on a Kansas statute which gave plaintiff a cause of action contrary to the public policy of Missouri. In *Wells* v. *Davis,* 303 Mo. 388, 261 S. W. 58, the question was the legal capacity of plaintiff to sue in a Missouri court. In *State ex rel. Foraker* v. *Hoffman,* 309 Mo. 625, 274 S. W. 362, the motion to dismiss rested upon a contention that a statute was unconstitutional because it was in conflict with the commerce clause of the federal constitution. *Bright* v. *Wheelock,* 323 Mo. 840, 20 S. W. 2d 684, which is the case on which the Circuit Court rested its decision, involved a plea to the jurisdiction of the Missouri court and not a motion like those presented here. Thus it is obvious that none of these cases ruled one way or the other on the authority of a Missouri court to dismiss a case on the ground of inappropriate forum within the doctrine of *forum non conveniens.* Clear evidence of the fact that

Missouri has no such rule are the decisions which hold squarely that a Missouri court may decline to exercise its jurisdiction in a case where it has a clear right to proceed if circumstances justified maintaining the case in a Missouri court. (*Mosely* v. *Empire Gas & Fuel Co.*, 313 Mo. 225, 281 S. W. 762; *State ex rel.* v. *Denton*, 229 Mo. 187, 129 S. W. 709; *Cary* v. *Schmeltz*, 141 Mo. App. 570, 125 S. W. 532; *Maxey* v. *Railey & Brothers Banking Co.* (K. C. Court of Appeals), 57 S. W. 2d 1091.) The privilege of free access to the courts guaranteed by state constitutions must be tempered with reasonable limitations. *Whitney* v. *Madden*, 400 Ill. 185, 79 N. E. 2d 593, 595; *Universal Adjustment Corp.* v. *Midland Bank, Ltd.*, 281 Mass. 303, 184 N. E. 152, 161.

We think it clear from a reading of the opinion of the Supreme Court of Missouri that it purposely reserved its decision on questions of state law and rested its decision on federal grounds only so that this Court would have jurisdiction to settle the disputed question of limitations, if any, placed by federal law upon the freedom of state courts to protect themselves and litigants in their courts from imposition of imported cases by refusing to exercise their jurisdiction under the doctrine of *forum non conveniens*. This question can be authoritatively settled only by this Court, and the Supreme Court of Missouri rendered a public service in resting its decision on federal grounds only so that this case squarely presents for decision the restrictions, if any, of Section 6 of the Federal Employers' Liability Act upon the application of the doctrine of *forum non conveniens* by state courts.

The question presented by this record is a narrow one. It is whether there is any provision of the Constitution or the statutes of the United States which denies to the courts of the several states the right to decline jurisdiction of a case arising under the Federal Employers' Lia-

bility Act under the principles of *forum non conveniens*. No other question is presented by the record.

IV-V.

A.

The Congress of the United States, in the Enactment of the Federal Employers' Liability Act, Did Not Legislate With Respect to the Venue or Procedure of State Courts. It Dealt Only With the Venue and Procedure of Federal Courts.

The briefs of petitioners, appended to their respective petitions for writ of certiorari to review the judgment of the Supreme Court of Missouri entered in the consolidated cases, pointed out (pp. 12-19) that it clearly appears from the language of Section 6 (Sec. 56, Title 45, U. S. Code) of the Federal Employers' Liability Act that Congress did not even purport to determine the venue or the rules of procedure of state courts and that the history of the legislation shows clearly that Congress left to the states the determination of how the state courts would exercise the jurisdiction of F.E.L.A. cases which they already possessed. This interpretation of Section 6 is squarely supported by the decision of this Court in *Douglas* v. *N. Y., N. H. & H. R. Co.*, 279 U. S. 377, and respondents have referred to no decision of this Court to the contrary.

This Court held in *Ex Parte Collett*, 337 U. S. 55, 61, that "[the words selected by Congress for § 6 denote nothing, one way or the other, respecting *forum non conveniens*," and if there is anything in the federal statutes which denies to state courts the right to apply the doctrine of *forum non conveniens* to an appropriate case brought under the act it must be found elsewhere than in the language of Section 6. Respondents have referred to no such statute.

It is sometimes said, as the Missouri Court says (Tr. 74), that Congress *conferred* jurisdiction on state courts to entertain cases arising under the act, but the language of the act does not bear that construction. The only jurisdiction conferred by the act is on the federal district courts and the act states that that jurisdiction "shall be concurrent with that of the courts of the several states." The language employed shows clearly that Congress assumed that state courts of general jurisdiction already possessed jurisdiction to entertain such actions, and this Court and state courts have repeatedly held that this appears from the language of the act. (*Second Employers' Liability Cases*, 223 U. S. 1, 56; *Douglas* v. *N. Y., N. H. & H. R. Co.*, 279 U. S. 377, 387-8; *Herb* v. *Pitcairn*, 324 U. S. 117, 120; *Murnan* v. *Wabash Ry. Co.*, 246 N. Y. 244, 158 N. E. 508; *Taylor* v. *Southern Ry. Co.*, 350 Ill. 139, 182 N. E. 805; *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio 352, 140 N. E. 94; *Mooney* v. *D. & R. G. W. R. Co*—Utah—, 221 P. 2d 628.) The Supreme Court of Missouri so held in *White* v. *Mo. Pac. Ry. Co.*, 178 S. W. 83; where it said (p. 84) "The amendment did not vest original jurisdiction in state courts. It recognized it as rightfully existing in them."

State courts derive their authority from state law and they exercise a state jurisdiction when they enforce rights created by federal statute. (*Minnesota & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211, 219; *Claflin* v. *Houseman*, 93 U. S. 130, 141; Barnett, The Delegation of Federal Jurisdiction to State Courts, Selected Essays on Constitutional Law, Vol. 3, p. 1202.) The fact that the federal courts are given jurisdiction concurrent with that already possessed by state courts, as is the situation with F. E. L. A. cases, does not change the state court into a federal court nor does it change the usual rules of practice and procedure of the state court exercising its jurisdiction in the enforcement of a right resting on a federal statute.

Inconsistently with its holding in the instant case, the Missouri Supreme Court has held that the authority and procedure of a court is determined by the laws of the state of its creation. (*Mosely* v. *Empire Gas & Fuel Co.*, 313 Mo. 225, 281 S. W. 762, 768.) There is nothing in Article III, Section 1, of the Constitution of the United States, which vests the judicial power of the United States in the Supreme Court and in such inferior courts as Congress may from time to time ordain and establish, or in Article I, Section 8, which grants to Congress the power to constitute tribunals inferior to the Supreme Court and to make all laws which shall be necessary and proper for carrying into execution this power, which suggests that Congress may compel state courts to exercise a jurisdiction which they do not already possess under the constitutions and statutes of their respective states. "The state policy decides whether and to what extent the state will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions." *Chambers* v. *B. & O. R. Co.*, 207 U. S. 142, 148-9.

The inherent power of state courts to apply the principles of *forum non conveniens* in order to promote an orderly administration of justice is not a new concept. It has a long history in the courts of Scotland and England as well as in the American courts. (*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507; Blair, the Doctrine of *Forum Non Conveniens* in Anglo-American Law, 29 Columbia Law Review 1; Dainow, The Inappropriate Forum, 29 Illinois Law Review 867; Barrett, The Doctrine of *Forum Non Conveniens*, 35 California Law Review 380; Foster, Place of Trial in Civil Actions, 43 Harvard Law Review 1217.) Among the decisions of state courts which have recognized and applied the doctrine of *forum non conveniens* are *Pietraroia* v. *N. J. & H. R. Ry. & Ferry Co.*, 197 N. Y. 434, 91 N. E. 120; *Jackson & Sons* v. *Lumbermen's Mutual Casualty Co.*, 86 N. H. 341, 168 Atl. 895; *Sielcken* v. *Sorenson*, 111 N. J.

Eq. 44, 161 Atl. 47; *Universal Adjustment Corp.* v. *Midland Bank, Ltd.*, 281 Mass. 303, 184 N. E. 152; *Whitney* v. *Madden*, 400 Ill. 185, 79 N. E. 2d 593; *Mexican National R. Co.* v. *Jackson*, 89 Tex. 107, 33 S. W. 857; *Stewart* v. *Litchenberg*, 148 La. 195, 86 So. 734; *Horner* v. *Pleasant Creek Mining Co.*, 165 Ore. 683, 107 Pac. 2d 989; *Grovey* v. *Washington National Insurance Co.*, 196 Ark. 697, 119 S. W. 2d 503; *Mooney* v. *D. & R. G. W. R. Co.*—Utah—221 P. 2d 628; *Great Western Ry. Co.* v. *Miller*, 19 Mich. 305.

This Court is not called upon to determine whether the State of Missouri shall join the increasing number of states which recognize and apply through their courts the doctrine of *forum non conveniens* in protecting defendants from the oppressiveness and vexation of an inconvenient forum and in protecting their citizens from being crowded out of their courts by cases of non-resident litigants and in protecting the courts in congested centers from the added administrative problems of imported cases, as respondents suggest. (Br. p. 35.) The only question to be determined by this Court is whether there is anything in the language of Section 6 of the Federal Employers' Liability Act which inhibits the courts of Missouri from applying the principle of *forum non conveniens* in order to promote an orderly administration of justice.

B.

The Missouri Supreme Court Erred in Its Interpretation of the Opinions of This Court in the Kepner and Miles Cases.

Respondents have failed in their attempt to find anything in the *decisions* in *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, and *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, which supports the decision of the Supreme Court of Missouri.— They rely on general expressions

lifted out of context. The doctrine of *forum non conveniens* was not involved in either of these cases. The forum in which the case was pending was not called upon to determine whether the exercise of its jurisdiction should be withheld because of matters of convenience to the parties or to other litigants or to the Court. We think, from reading the three opinions filed in the *Miles* case, that it is clear that this Court was unanimous in its conclusion that the Missouri court might have declined to proceed with the trial of a F. E. L. A. action arising out of an accident in Tennessee involving non-residents of Missouri. Whatever "judicial gloss" was added to the language of Section 6 of the act by general expressions in the opinion was removed by the specific disclaimer (315 U. S. 704) that this Court was denying to a Missouri court the right to apply the principles of *forum non conveniens* to cases pending before it.

The Supreme Court of Utah, in the late case of *Mooney v. D. & R. G. W. R. Co.*, 221 Pac. 2d 628, considers and analyzes at length the decisions of this Court (pp. 631-9) and the decisions of state supreme courts (pp. 641-6) upon which respondents here rely. It reaches the conclusion that when the language of the opinions of this Court is limited to the issues involved, this Court has held merely that federal district courts prior to the enactment of Section 1404(a) of the Judicial Code could not dismiss or transfer a F. E. L. A. case on the ground of inconvenience under the doctrine of *forum non conveniens*, and that there was nothing in Section 6 of the Federal Employers' Liability Act or in the decisions of this Court construing it which denied to state courts the right to apply the principles of *forum non conveniens* and dismiss a F. E. L. A. case if the facts of the particular case justified the court in refusing to exercise its jurisdiction on grounds of convenience. Pertinent to the issue here for decision, the Utah Court said (221 Pac. 2d 640):

"A different principle is involved and, we believe, has been announced when a suit is instituted in a state court. In practically every cited case we find statements to the effect that the state concerned determines the limitations of the jurisdiction of its courts and the character of the controversy which it will hear. Each separate state decides whether and to what extent it will entertain in its courts transitory causes of action when they arise in other jurisdictions. It seems that weaving throughout the cases is the principle announced in the Second Employers' Liability Act Cases, *supra*. There the Supreme Court held that when Congress enacted the Federal Employers' Liability Act it did not attempt to enlarge, regulate or control the jurisdiction of the state courts or affect their modes of procedure. All that was intended by that enactment was to confer jurisdiction on the state courts to hear and try the issues if consistent with the practice then in vogue. It would indeed be bringing into imbalance the respective powers of the federal and state governments to permit the Congress to dictate the terms and conditions under which a state court must administer the law. As the majority of the Supreme Court held in *Miles* v. *Illinois Central Railroad Co., supra*, the state court was not required to permit F. E. L. A. litigation under all causes and under all circumstances.

"While the United States Supreme Court has held that one state may not enjoin one of its citizens from prosecuting a cause of action under a F. E. L. A. statute in another state or Federal Court, there are principles other than *forum non conveniens* involved in those holdings. There is the problem that Congress has permitted suit in the courts of all states and there may be some limitation on a state's right to prevent its citizens from taking advantage of rights given by federal statutes when the state entertaining the suit is willing to assume jurisdiction. That question involves principles separate and distinct from the right of a state to attach some conditions to the use of its courts by non-residents."

C.

Section 6 of the Federal Employers' Liability Act, if It Meant What the Missouri Supreme Court Says It Means, Would Invade the Fundamental Right of States to Regulate and Control the Venue and Procedure of State Courts.

We think it clear that the Missouri Supreme Court has placed an interpretation on the Federal Employers' Liability Act which brings it in direct conflict with fundamental concepts of separation of powers between the United States and the several states.

"That Congress has undertaken to regulate the exercise of jurisdiction by our [New York] courts by making compulsory what in other similar cases is discretionary seems an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore exercised." (*Murnan* v. *Wabash R. Co.*, 246 N. Y. 244, 158 N. E. 508, 509.) "It would indeed be bringing into imbalance the respective powers of the federal and state governments to permit the Congress to dictate the terms and conditions under which a state court must administer the law." *Mooney* v. *D. & R. G. W. R. Co.*—Utah—221 P. 2d 628, 640.

Respondents point to nothing in the Constitution of the United States which even suggests that Congress has authority to require state courts to exercise a jurisdiction which they do not already possess or to inhibit state courts from exercising their inherent powers to promote the orderly administration of justice by appropriate action under state practices and procedures.

VI.

Since Congress by Enactment of Section 1404(a) of the Judicial Code Declared a General Federal Public Policy Favoring the Application of the Principle of Forum Non Conveniens to All Civil Actions in Federal Courts, No Possible Inference Can Now Be Drawn from the Language of the Federal Employers' Liability Act Forbidding the Application of That Doctrine by State Courts to Actions Under That Act.

This Court, in *Ex Parte Collett*, 337 U. S. 55, made it clear (p. 61) that "the words selected by Congress for § 6 [of F. E. L. A.] denote nothing, one way or the other, respecting *forum non conveniens*", and, in referring to the application of the principle of *forum non conveniens* in federal courts, pursuant to the authority of Section 1404(a) of the Judicial Code, and in state courts, pursuant to the established state practice, said (p. 60), "An action may still be brought in any court, state or federal, in which it might have been brought previously." The question of whether the selected forum is convenient can never arise if there is an absence of jurisdiction in the forum. The application of the doctrine of *forum non conveniens* always presupposes that there are at least two forums in which the plaintiff can bring his action and in which the defendant is amenable to process. The doctrine merely furnishes the criteria for choice between these forums. *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 504, 507.

While Section 1404(a) of the Judicial Code of course is applicable only to federal district courts, nevertheless it does announce a general federal public policy to recognize and apply the doctrine of *forum non conveniens* in all civil actions in federal district courts, including actions under the Federal Employers' Liability Act. This Court said in the *Collett* case (337 U. S. 60), "Section 6 of the

Liability Act defines the proper forum; § 1404(a) of the Code deals with the right to transfer an action properly brought. The two sections deal with two separate and distinct problems. Section 1404(a) does not limit or otherwise modify any right granted in § 6 of the Liability Act or elsewhere to bring suit in a particular district." Applying this reasoning to the situation at bar, the fallacy of the reasoning of the Missouri Supreme Court becomes apparent. It confused the right to bring the subject actions in the Circuit Court of the City of St. Louis, Missouri, which derives from the Constitution and statutes of Missouri, with the right in the Circuit Court to decline to hear the case under the principles of *forum non conveniens*, which was inherent in the Court's duty and authority to provide for an orderly administration of justice. The doctrine of *forum non conveniens* does not limit or otherwise modify any right granted by the Missouri Constitution or statutes to *file* the action in the Circuit Court of the City of St. Louis, and the petitioners have never contended that it does.

Assuming that Congress had power to deal with the authority of a state court to exercise its jurisdiction in applying the principle of *forum non conveniens*, it is inconceivable that Congress intended at the same time to authorize all federal district courts to apply the doctrine in F. E. L. A. cases by removing the "judicial gloss" of the *Kepner* case by the enactment of Section 1404(a) of the Judicial Code, and yet intended to continue by its silence a federal prohibition deriving from the "judicial gloss" of the *Miles* case which respondents contend forbids state courts to apply the doctrine under the same facts. This would create an incongruous and intolerable situation by further burdening state courts in congested centers with all of the cases imported into that jurisdiction, whatever the inconvenience to defendants, to other litigants, and to the courts of the selected forum.

As the Superior Court of Los Angeles County, California said in dismissing two F. E. L. A. cases April 28, 1950, (*Jergins* v. *A. T. & S. F. Ry. Co.*, No. 560557 and *Martin* v. *A. T. & S. F. Ry. Co.*, No. 569609, not reported):

> "Congress recognized the injustice of compelling defendants in F. E. L. A. actions to defend in an inconvenient forum, selected by the plaintiff, and permitted a transfer in federal courts when it is in the interest of justice so to do.
>
> "This recognition of the applicability of *forum non conveniens* to F. E. L. A. cases brought in federal courts should, in justice, be extended to cases brought in state courts. Where the reason is the same the rule should be the same.
>
> "If the rule is not applied to actions brought in state courts then a plaintiff could file his action in a federal district court, and upon a motion for transfer on the ground of *forum non conveniens* being filed dismiss the action and file a new action in a state court, in the same district, and thus defeat the purpose of Congress in adopting Section 1404(a)."

VII.

The Application of the Doctrine of Forum Non Conveniens in F. E. L. A. Cases Does Not Violate the Privileges and Immunities Clause of Article IV, Section 2, of the Constitution of the United States.

Every court, federal and state, which has recognized and applied the doctrine of *forum non conveniens* in refusing to retain for trial and decision a case of which it had jurisdiction but which it determined the orderly administration of justice required to be tried in a more appropriate forum, in effect held that the privileges and immunities clause of Article IV, Section 2, of the Constitution of the United States did not prohibit the application of the doctrine. Otherwise, the doctrine could never be applied, whatever the circumstances.

The privileges and immunities clause does not purport to grant rights to citizens of the states nor does it profess to control the power of a state over its own citizens. "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." *Slaughter-House Cases*, 16 Wall. 36, 77.

Petitioners do not ask that the courts of Missouri treat citizens of other states any differently than they treat citizens of Missouri. What they ask of the Missouri courts is a holding that any plaintiff, citizen or non-citizen, because of considerations of convenience, be denied the privilege of prosecuting his case in a court in Missouri, which arises out of an occurrence in a distant state, where the facts of the particular case establish such oppressiveness or vexatiousness to a defendant as to be out of all proportion to plaintiff's convenience, or make trial in the chosen forum inappropriate because of considerations affecting the court's own administrative problems, or show that litigants whose cases are properly before the court are denied an early trial because of the congestion created by imported cases. The citizenship of the plaintiffs in the subject cases was not a factor in petitioners' request for a dismissal of the cases by the Circuit Court of the City of St. Louis, and the residence of the plaintiffs was only one of the factors presented for the Court's consideration. More important factors were the convenience of the witnesses necessary for a fair trial of the issues, the greatly increased expense to the defendants, defendants' inability to compel attendance of the witnesses, and the congested docket of the court and the increase in administrative problems by reason of the

presence of cases on the docket which were in all their aspects foreign to the local jurisdiction. (Tr. 24-7, 53-7.)

It is well established that the mere fact that a court has jurisdiction to entertain a case does not require it to exericse its jurisdiction to hear and determine the issues. (*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 507; *Massachusetts* v. *Missouri*, 308 U. S. 1, 19; *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123, 130; *Canada Malting Co.* v. *Paterson Co.*, 285 U. S. 413, 422-3; *Whitney* v. *Madden*, 400 Ill. 185, 189, 79 N. E. 2d, 593; *Universal Adjustment Corp.* v. *Midland Bank, Ltd.*, 281 Mass. 303, 184 N. E. 152; *Pietraroia* v. *N. J. & H. R. Railway & Ferry Co.*, 197 N. Y. 434, 91 N. E. 120; *Sielcken* v. *Sorenson*, 111 N. J. Eq. 44, 161 Atl. 47; *Jackson & Sons* v. *Lumbermen's Mutual Casualty Co.*, 86 N. H. 341, 168 Atl. 895; *Mexican National R. Co.* v. *Jackson*, 89 Tex. 107, 33 S. W. 857; *Stewart* v. *Litchenberg*, 148 La. 195, 86 So. 734; *Horner* v. *Pleasant Creek Mining Co.*, 165 Ore. 683, 107 Pac. 2d 989; *Grovey* v. *Washington National Insurance Co.*, 196 Ark. 697, 119 S. W. 2d 503; *Great Western Ry. Co.* v. *Miller*, 19 Mich. 305.) This is the rule in Missouri. *Mosely* v. *Empire Gas & Fuel Co.*, 313 Mo. 225, 281 S. W. 762.

This Court and state courts have held squarely that a state court having jurisdiction of a case arising under the Federal Employer's Liability Act has the right to refuse to exercise its jurisdiction on grounds of inconvenience. (*Douglas* v. *N. Y., N. H. & H. R. Co.*, 279 U. S. 377; *Murnan* v. *Wabash Ry. Co.*, 246 N. Y. 244, 158 N. E. 508; *Taylor* v. *Southern Ry. Co.*, 350 Ill. 139, 182 N. E. 805; *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio 352, 140 N. E. 94; *Mooney* v. *D. & R. G. W. R. Co.*, Utah 1950, 221 P. 2d 628.) Implicit in these decisions is the holding that to refuse to exercise jurisdiction in a F. E. L. A. case is not a violation of the privileges and immunities clause.

The decision of this Court in the *Douglas* case, which has been re-affirmed and followed right down to the present time, should settle the proposition that the application of the doctrine of *forum non conveniens* by a state court in a F. E. L. A. case does not violate Article IV, Section 2, of the Constitution of the United States. The Supreme Court of Missouri tries to distinguish this case on the ground that the decision rests on a statute of New York. It does nothing of the kind. The decision was reached notwithstanding a statute which provided that "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only: * * * 4. When a foreign corporation is doing business within this State." It was contended by Douglas that this statute gave him an absolute right to mantain his case against the railroad because it was a foreign corporation doing business in New York and that to deny him the right to maintain his case would violate Article IV, Section 2, of the United States Constitution. This contention was rejected by the New York courts and by this Court. Obviously, the New York statute quoted in the Missouri Supreme Court opinion (Tr. 73), like Section 6 of F. E. L. A., denotes nothing one way or the other respecting *forum non conveniens*. The *Douglas* case is not distinguishable from the instant subject cases and the decision of the Missouri Supreme Court is directly in conflict with the decision of this Court.

The decision of the New York Court in the *Douglas* case, which was affirmed by this Court, followed its decision in *Murnan* v. *Wabash Ry. Co.*, 246 N. Y. 244, 158 N. E. 508, which is cited by this Court with approval in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501. The *Murnan* case involved an action begun in the New York state court by a Connecticut plaintiff, based on a claim under F. E. L. A., for an accident which occurred in Michigan on

defendant's railroad. The trial court applied the principle of *forum non conveniens* to dismiss the case. The Court of Appeals, in affirming, said (158 N. E. 509):

> "That Congress has undertaken to regulate the exercise of jurisdiction by our courts by making compulsory what in other similar cases is discretionary seems an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore exercised. We conclude that a litigant who brings his action under the federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister state. He may not be cast out because he is suing under the act of Congress. He may not enforce his rights merely because he is suing under the act."

Among other cases in which it has been held that it is not a denial of the guaranteed privileges and immunities to refuse to entertain jurisdiction on the ground of convenience within the principle of *forum non conveniens* are *Missouri Pacific R. Co.* v. *Clarendon Boat Oar Co., Inc.*, 257 U. S. 533, 535; *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, 561; *LaTourette* v. *McMaster*, 248 U. S. 465, 468; *Chambers* v. *Baltimore & Ohio R. Co.*, 207 U. S. 142, 149; *Chemung Canal Bank* v. *Lowery*, 93 U. S. 72, 77; *Whitney* v. *Madden*, 400 Ill. 185, 79 N. E. 2d 593; *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 315, 19 N. E. 625; *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio 352, 140 N. E. 94; *Tanner* v. *DeVinney*, 101 Neb. 46, 161 N. W. 1052.

We think a casual reading of the opinion of the Missouri Supreme Court shows that it does not have a proper conception of the application of the principles of *forum non conveniens*. (Tr. 74.) It says that since Missouri permits its citizens to *file* F. E. L. A. cases in its courts, it is a violation of the privileges and immunities clause to deny

the same privilege to citizens of other states. Petitioners have never contended that plaintiffs in the subject cases did not have a right to *file* their cases in the Circuit Court of the City of St. Louis. If the cases were not properly commenced in the Missouri courts, the doctrine of *forum non conveniens* is inapplicable. (*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 504.) The inquiry on a motion to dismiss under the doctrine is whether the chosen forum should hear the case when on a balance of conveniences another available forum is more appropriate for the trial, not whether the case was one which could be filed in the chosen forum. Where the doctrine is recognized, "an action may still be brought in any court, state or federal, in which it might have been brought previously." (*Ex parte Collett*, 337 U. S. 55, 60.) Whether jurisdiction shall be retained is a question for the selected forum to decide.

The Utah Supreme Court, in *Mooney* v. *D. & R. G. W. R. Co.*, 221 Pac. 2d 628, answers soundly the illogical reasoning of the Missouri Supreme Court (Tr. 74) that since Missouri allows its citizens to maintain F. E. L. A. cases in its courts it must allow citizens of other states the same privilege. As the Utah court says (p. 646) there would be force to the contention if in any of the cases the doctrine of *forum non conveniens* had been in issue and it had been decided that it could not be applied in the case of a citizen of the state whatever the circumstances. But as the Utah court points out, there is no such decision in Utah, and we point out that neither the Missouri Supreme Court nor respondents cite any Missouri case so holding. Petitioners' motions were in no sense based on the citizenship of the plaintiffs in the subject cases and the respondents did not refuse to entertain the motions on the ground of denial of equal privileges. The refusal of the Supreme Court of Missouri to require the Circuit Court to entertain the motion of petitioners on the merits was based

solely on the ground that Section 6 of F. E. L. A., as construed by this Court, inhibited state courts from declining to exercise its jurisdiction in a F. E. L. A. case. (Tr. 73, 75.) When that erroneously assumed barrier is removed and the Missouri courts come to apply Missouri law to the determination of the motions to dismiss, it must be assumed they will apply it consistently with constitutional limitations, but there is no constitutional provision which renders state courts impotent to do justice under the facts of a particular case.

We quote the answer of the Utah Supreme Court to the illogical contention that a state court must entertain every F. E. L. A. case imported into its jurisdiction because it has not heretofore applied the doctrine of *forum non conveniens* to dismiss one which the special circumstances show should be tried in the forum of its origin (221 Pac. 2d 646):

> "It would be necessary to sustain plaintiff's contention if we were to hold that the doctrine was applicable only in cases arising under federal acts or if we were to discriminate against him by refusing to enforce a right granted by a federal statute. Furthermore, the same complaint would be legitimate if we did not accord to plaintiff substantially the same access to our courts we accord our own citizens. However, we are of the opinion that if the doctrine is applied in this cause and applied in all instances when a cause of action arises out of the state and the residence of one party or all parties makes the doctrine applicable, we do not run afoul of the federal constitutional provisions under such an interpretation and procedure. We accord to every litigant the right to institute a suit in the courts of this state subject to the right of the other party to enter a plea of *forum non conveniens* when the cause of action arises outside the jurisdiction of this state. It may be conceded that the doctrine may have little or no application if one of the parties resides in this state, but because

one litigant may not be able to sufficiently establish inconvenience does not render the application of the principle in other cases unconstitutional."

The doctrine of *forum non conveniens* does not concern itself with the question of the citizenship of the plaintiff but refers to the suitability of the forum chosen by the plaintiff where he has a choice of forum. The doctrine may apply to a citizen of a state in which the action is pending as well as to a citizen of another state. It is not the privilege of any litigant, citizen or non-citizen, to choose an inappropriate forum and interfere with the orderly administration of justice, and there is nothing in the Constitution of the United States which protects him in an attempt to transport his cause of action to a distant forum and to maintain it there for illegitimate purposes.

Conclusion.

A plaintiff having a legitimate right to maintain his case in a state court selected by him can and will be protected in that right without denying to the selected forum the right to refuse to retain for trial a case which it is clear was procured and transported from a distant state for illegitimate purposes. The doctrine of *forum non conveniens* is a wholesome doctrine and its proper application does not conflict with any legitimate right or privilege of a plaintiff.

Whether the state courts are denied by applicable federal law the right to apply the doctrine in an appropriate case is the issue to be decided by this Court in this case. Whether the doctrine shall be applied by the Circuit Court of the City of St. Louis and the subject cases dismissed, when it has been freed from the restraint which the Supreme Court of Missouri has mistakenly concluded is imposed by federal statute, is for that Court to decide

under the law of Missouri as finally determined by the Supreme Court of that state.

The Supreme Court of Missouri has erroneously held that Section 6 of the Federal Employers' Liability Act prohibits a state court from applying the doctrine of *forum non conveniens* to dismiss an imported case brought under that Act and its judgment should be reversed.

Respectfully submitted,

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